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unacceptable for Ms McMullan, in her capacity as an investigator under the PID Act, to have limited herself to the evidence available to her because she may have had a sinking feeling in her gut that a request for further evidence would have forced her to conclude that the evidence would support a finding that the reclassifications had occurred to create an SES Band 1 position for Ms O'Connor.

1211 It must always be kept in mind that the PID investigator is not some kind of impartial tribunal, like a court of law, which must act on the evidence adduced by parties in an adversarial setting. To put it conveniently (perhaps at the expense of some accuracy, though not much), an investigator functioning under the PID Act takes on an inquisitorial role. Ms McMullan has misapprehended her legal duties as an investigator under the PID Act and such a misapprehension goes a considerable way to supporting my belief that Ms McMullan's investigation was inadequate.

1212 It is plain to see how Ms McMullan's investigation was inadequate. First, Ms McMullan has drawn conclusions that could not be drawn on the evidence available to her. Second, Ms McMullan has failed to competently investigate the allegations under the PID Act by limiting herself to evidence that had been provided to her and deliberately failing to ask for further evidence in the light of the compelling circumstantial evidence indicating that, at the very least, the National Judicial Registrar and District Registrar position in the Queensland District Registry of the Federal Court was reclassified to provide an SES Band 1 position to somebody in Sydney.

8.5.1.7 On the basis of the evidence and on the balance of probabilities', the allegation that 'that Mr Belcher and possibly Mr Trott were deliberately precluded from being appointed to SES Band 1 positions in order to hold SES Band 1 positions available for others, possibly including Ms O'Connor, Ms Gitsham and Mr Benter' was 'not substantiated'

1213 For the reasons set out in parts 8.5.1.1 – 8.5.1.6, Ms McMullan's conclusion that the allegation that 'that Mr Belcher and possibly Mr Trott were deliberately precluded from being appointed to SES Band 1 positions in order to hold SES Band 1 positions available for others, possibly including Ms O'Connor, Ms Gitsham and Mr Benter' was 'not substantiated' is plainly wrong.

8.5.2 The Australian Public Service Commissioner's representative on the selection panel "vetoed" appointment of Mr Belcher to the SES Band 1 District Registrar role or alternatively, Mr Soden falsely asserted that Australian

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Public Service Commissioner's representative on the selection panel had done so

1214 In her report of 9 December 2020, Ms McMullan most likely stated that I had alleged that:

> That the Australian Public Service Commissioner's representative on the selection panel "vetoed" appointment of Mr Belcher to the SES Band 1 District Registrar role or alternatively, Mr Soden falsely asserted that Australian Public Service Commissioner's representative on the selection panel had done so.

1215 Her findings in respect of the allegation were, most likely:

> On the balance of probabilities, I find that this assertion about the Australian Public Service Commissioner's representative on the selection panel is not substantiated. On the basis of materials provided by the FCASA including a selection report, I find that the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner's representative on the selection panel) to be the preferred candidate for the advertised position. On the balance of probabilities, I find that no "veto power" was exercised or purported to be exercised by the Australian Public Service Commissioner's representative on the selection panel. On the balance of probabilities I find that Mr Belcher was appointed to a[n] Executive Level 2 position on the basis of a role review undertaken across the [REDACTED] rather than because of any actions or recommendations of the Australian Public Service Commissioner's representative on the selection panel.
>
> In those circumstances, it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner's representative on the selection panel had exercised a "veto power"; however, in absence of a "veto power" being exercised or being purported to be exercised, any incorrect statement by Mr Soden (whether due to a misstatement on Mr Soden's behalf, a misunderstanding on Justice Greenwood's behalf, a miscommunication between the two, or for some other reason) about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct. On that basis, I make no further findings about any such comments that may have been made.

1216 The following things are noted about Ms McMullan's findings.

1217 First, Ms McMullan stated that, on the basis of materials provided by the FCASA, including a selection report, 'the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner's representative on the selection panel) to be the preferred candidate for the advertised position'.

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1218 Second, Ms McMullan most likely claims to have found, on the balance of probabilities, that 'no "veto power" was exercised or purported to be exercised by the Australian Public Service Commissioner's representative on the selection panel'.

1219 Third, Ms McMullan most likely claims that '[o]n the balance of probabilities … Mr Belcher was appointed to a[n] Executive Level 2 position on the basis of a role review undertaken across the [REDACTED] rather than because of any actions or recommendations of the Australian Public Service Commissioner's representative on the selection panel'.

1220 Fourth, Ms McMullan most likely states that 'it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner's representative on the selection panel had exercised a "veto power"', but that 'in absence of a "veto power" being exercised or being purported to be exercised, any incorrect statement by Mr Soden … about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', and that, accordingly, Ms McMullan would refuse to make 'further findings about any such comments that may have been made'.

1221 These four points will be subjected to scrutiny.

8.5.2.1 On the basis of materials provided by the FCASA, including a selection report, 'the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner's representative on the selection panel) to be the preferred candidate for the advertised position'.

1222 It is not at all clear on the basis of what materials, other than a selection report, Ms McMullan concluded that 'the outcome of the recruitment process was that Mr Belcher was found by the panel (including the Australian Public Service Commissioner's representative on the selection panel) to be the preferred candidate for the advertised position'.

1223 A selection report was prepared in relation to the recruitment of the National Judicial Registrar and District Registry position in the Queensland District Registry.

1224 The selection report is reproduced in Annexure EDR – 129. As has already been noted, the selection report can be broadly broken down into three sections.

1225 The first section, being the first four pages of Annexure EDR – 129, contains the selection committee's notes about the merits of the candidates for National Judicial Registrar & District Registrar – Queensland District Registry vacancy (vacancy NN 10725159).

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1226 The second section, being the fifth page of Annexure EDR – 129, contains the names and titles of the members of the selection committee.

1227 The members of the selection committee were Ms Lagos, Mr Pringle and Ms Jarratt. The second section contains 'Vacancy Details' including the 'Job Title' ('National Judicial Registrar & District Registrar, QLD') and the 'Classification' ('SES Band 1'). The second section also bears Ms Lagos' name and signature as endorsing the recommendations of the selection panel in her capacity as 'delegate'. Though signed by each of the members of the selection panel, the document does not bear the dates on which the members of the selection panel signed the selection report. Importantly, and contrary to Ms McMullan's claim that 'Mr Belcher was found by the panel (including the Australian Public Service Commissioner's representative on the selection panel) to be the preferred candidate for the advertised position', nothing in the report of the selection committee supports the proposition that the Australian Public Service Commissioner's representative, Ms Kerryn Vine-Camp, was a member of the selection panel. Ms Vine-Camp did not sign the selection report or record any notes on the selection report. There was no evidence available to Ms McMullan that supported the proposition that 'that Mr Belcher was found by the panel (including the Australian Public Service Commissioner's representative on the selection panel) to be the preferred candidate for the advertised position'. Ms McMullan's claim is, thus, patently false.

1228 The third section, being the sixth page of Annexure EDR – 129., contains a certificate certifying that 'the selection process complied with subsection 10A(2) of the *Public Service Act 1999* and the requirements of the Directions' pursuant to '[s]ection 21 of the *Australian Public Service Commissioner's Directions 2016*'. The certificate was signed by Ms Kerryn Vine-Camp, First Assistant Commissioner in the APSC and dated 25 October 2018. It is remarkable that the Australian Public Service Commissioner's representative would have provided a certificate setting out that the selection process in respect of an SES Band 1 position complied 'with subsection 10A(2) of the *Public Service Act 1999* and the requirements of the Directions' when Ms McMullan has stated that the National Judicial Registrar & District Registrar position in the Queensland District Registry was reclassified as a position with an Executive Level 2 classification pursuant to a 'role review'. Why would the Australian Public Service Commissioner's representative knowingly sign a certificate that is issued only when people are to be engaged as, or promoted to the rank of, SES employees? Why would an SES employee knowingly waste her time by participating in a recruitment process for a vacancy that had been, as Ms McMullan would have us believe, reclassified pursuant to an appropriate (and lawful)

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'role review' to a classification that made it unnecessary for a person to issue a certification pursuant to section 21 of the *Australian Public Service Commissioner's Directions 2016*'? That makes no sense.

1229 One would think that the issuance of such a certificate for a vacancy that had been reclassified as a position with an Executive Level 2 classification pursuant to a 'role review' would be a red flag for an investigator. Apparently not.

1230 Second, though the members of the selections committee, Ms Lagos, Mr Pringle and Ms Jarratt, failed to date the selection report, they did each sign the selection report and, as such, acknowledged that they each 'read the selection report and agree with its content', while also acknowledging that they were each 'aware of the correct policy and procedures for merit selection and certify that these have been followed'.

8.5.2.2 On the balance of probabilities, that 'no "veto power" was exercised or purported to be exercised by the Australian Public Service Commissioner's representative on the selection panel'

1231 Ms McMullan made a factual finding, on the balance of probabilities, that 'no "veto power" was exercised or purported to be exercised by the Australian Public Service Commissioner's representative on the selection panel'. This is a most interesting finding.

1232 According to subsection 51(3) of the PID Act, in preparing a PID report, a principal officer (or their delegate) must comply with any standards in force under section 74 of the PID Act. The relevant standard is the *Public Interest Disclosure Standard 2013*.

1233 It will be noticed that, in the opening paragraph of the PID report prepared by Ms McMullan, Ms McMullan recorded the following words:

> I, Kate McMullan, A/g Assistant Commissioner Integrity Performance and Employment Policy, and delegate of the principal officer of the Australian Public Service Commission, have prepared this investigation report in accordance with section 51 of the *Public Interest Disclosure Act 2013* (PID Act) and section 13 of the *Public Interest Disclosure Standard 2013* (PID Standard).

1234 Thus, Ms McMullan claim to have prepared her PID report 'in accordance with section 51 of the *Public Interest Disclosure Act 2013* (PID Act) and section 13 of the *Public Interest Disclosure Standard 2013* (PID Standard)'.

1235 Section 13 of the PID Standard reads as follows:

A report under section 51 of the Act must, where relevant:

(a) identify whether there have been one or more instances of disclosable conduct; and

(b) identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct relates; and

(c) explain the steps taken to gather evidence; and

(d) set out a summary of the evidence, as well as any findings and recommendations made based on that evidence.

1236 In her PID report, Ms McMullan noted:

[i]n preparing this disclosure report I have considered the following relevant matters:

- [d]isclosure report and attachments, provided to the APSC upon allocation on 11 May 2020 (as well as supplementary information and correspondence from discloser on 7 August 2020, 17 August 2020, 25 September 2020, 1 November 2020, 2 November 2020, 3 November 2020, 4 November 2020 and 11 November 2020) outlining disclosures amounting to allegations that proper recruitment practices were not undertaken with respect to the recruitment processes leading to the appointment of:
  - Mr Murray Belcher
  - Mr Russell Trott
  - Ms Susan O'Connor
  - Ms Claire Gitsham
  - Mr Matthew Benter
  - Mr Rupert Burns
  - Mr Phillip Allaway
  - Mr Tuan Van Le
  - Ms Caitlin Wu
  - Mr Rohan Muscat
- [m]aterials provided by the Federal Court of Australia Statutory Agency on 18 September 2020, 27 October 2020, 23 November 2020 and 24 November 2020 about the process underpinning the engagement of the each of the persons above, in response to requests for information from me.

1237 Ms McMullan has not identified any steps taken to gather evidence from the Australian Public Service Commissioner's representative, Ms Kerryn Vine-Camp, in the PID Report. Ms McMullan has not identified any steps taken to gather evidence from the Australia Public

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Service Commission in respect of any involvement in the recruitment of Mr Belcher into the position of National Judicial Registrar & District Registrar. Given that:

- it is mandatory for the principal officer or his or her delegate to explain the steps taken to gather evidence, and to set out a summary of the evidence, as well as any findings and recommendations made based on that evidence; and
- Ms McMullan has not explained any steps she took to gather evidence from the Australian Public Service Commissioner's representative, Ms Kerryn Vine-Camp or anybody in the APSC; and
- Ms McMullan has not set out a summary of the evidence, as well as any findings and recommendations made based on that evidence, gathered from Ms Kerryn Vine-Camp or anybody in the APSC; and
- Ms McMullan has not explained any steps that she took to gather evidence from Mr Soden; and
- Ms McMullan has not set out a summary of the evidence, as well as any findings and recommendations made based on that evidence, gathered from Mr Soden; and
- Ms McMullan has not explained any steps that she took to gather evidence from members of the selection committee (i.e. Ms Lagos, Mr Pringle or Ms Jarratt); and
- Ms McMullan has not set out a summary of the evidence, as well as any findings and recommendations made based on that evidence, gathered from members of the selection committee (i.e. Ms Lagos, Mr Pringle or Ms Jarratt); and
- Ms McMullan has set out a list of the materials she referred to in preparing her PID report, which does not include anything gathered from Ms Kerryn Vine-Camp, or the APSC, or Mr Soden; and
- Ms McMullan claims to have 'prepared [her] investigation report in accordance with section 51 of the *Public Interest Disclosure Act 2013* (PID Act) and section 13 of the *Public Interest Disclosure Standard 2013* (PID Standard)'

it would be eminently reasonable for me (and anybody, for that matter) to draw the inference that Ms McMullan did not gather any evidence from Ms Kerryn Vine-Camp, Mr Soden, or from anybody at the APSC as part of her investigation under the PID Act.

1238 There was ample evidence before Ms McMullan that Mr Soden claimed that the Australian Public Service Commissioner's representative had claimed that she would exercise a 'veto power' over Mr Belcher's selection as the most suitable candidate for the National Judicial

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Registrar & District Registrar position in the Queensland District Registry of the Federal Court of Australia.

1239 By way of example, Justice Greenwood noted in an email to Mr Soden, which is set out in Annexure EDR – 132, that:

> Warwick
>
> I want to raise with you some apparent anomalies in the view you have expressed about the role and power of the Australian Public Service Commissioner's representative in participating in a selection process for an SES position in a line agency. The APSC's rep does not have the power or authority to "veto" an appointment. The role of the rep is to test and challenge the views of the panel members. The governing principle under the Act is that appointments must be on merit.
>
> The role of the rep apart from testing the views of the panel members is to certify that the process (that is the selection process), was conducted properly. There is no suggestion here that the process was flawed. The proposition that Murray Belcher's appointment was and can be the subject of a so-called "veto" is not correct … The election not to offer him the position must be because he is not supported by the other members of the selection panel. It cannot be a function of a misplaced view that the APSC's rep can veto an appointment. If the APSC's rep is purporting to exceed the powers, rights and role under the Act and 2016 Guidelines, the Court should not accept that position. Could you let me know whether you agree or disagree with these observations? This is an important matter, as you would understand.

1240 By way of a further example, Justice Greenwood noted in an email to Chief Justice Allsop, which is set out in Annexure EDR – 134, that:

> James
>
> I'm in Japan at the moment on leave. I just want to let you know that a major problem is emerging concerning the DR position (it has a new name) in the Brisbane registry. Murray Belcher emerged from the selection process as the candidate to be appointed. However Warwick tells me there is a problem because the Australia Public Sector Commissioner has a veto on any SES appointment. The position Murray applied for is an SES role as it should be.
>
> To solve the problem Warwick wants to downgrade the role from an SES position, avoid the APSC's veto and appoint Murray. This reduces the standing of the position. It reduces Murray. Queensland is the 3rd largest State by population at 4.4 m and Brisbane is 2.2 m not including the Gold Coast and the Sunshine Coast. Of course the principal leadership role should be an

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SES position and Murray should be appointed to it. He has the unqualified support of the 8 resident judges, the profession and the staff. What more is required? Even the SA position supporting 3 judges with significantly less workload and responsibilities carries an SES classification.

Two things should be noted.

First, Warwick's advice that the APSC has a veto on appointment is wrong. It is inconsistent with the Public Sector Act 1999 and the APS Guidelines 2016. Second, the true position is that neither Warwick nor Sia want to appoint MB. The so-called "veto" is a red herring (obfuscation would be a better word) to prevent Murray being awarded the position. The SES classification, you will find, will have been taken somewhere else in the organisation.

Anyway, regrettably the 8 Brisbane Judges will not accept the downgrading of the role in the interests of the Court overall, for all the obvious reasons. Moreover we believe that Murray, having emerged from the selection process ought now be appointed. I sent you an email about this just as you were returning and I was leaving asking you to engage on the issue. Now it is a major problem. I agree that what is being done to MB is both unfair and unprincipled.

Warwick is overseas at the moment. I have had many exchanges with him that I would rather not have had. We are to talk when each of us return around 22/10. I had a bad feeling something like this was going to happen. It's a terrible thing they are doing to Murray who is entirely meritorious, and his family.

Andrew

1241 Plainly, there was ample evidence before Ms McMullan that Mr Soden had informed Justice Greenwood that the Australian Public Service Commissioner's representative had claimed that she would exercise a 'veto power' over Mr Belcher's selection as the most suitable candidate for the National Judicial Registrar & District Registrar position in the Queensland District Registry of the Federal Court of Australia.

1242 I again repeat that it must always be kept in mind that the PID investigator is not some kind of impartial tribunal, like a court of law, that must act on the evidence adduced by parties in an adversarial setting. To put it conveniently (perhaps at the expense of some accuracy, though not much), an investigator functioning under the PID Act takes on an inquisitorial role. But for exercising a discretion not to investigate under section 48 of the PID Act, and but for exercising a separate investigative power pursuant to section 49 of the PID Act, a principal officer of an agency, as defined under the PID Act, 'must investigate a disclosure if the handling of the

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disclosure is allocated to the agency under Division 1'.[509] As is noted in part 4.2.1 of Version 2 of the *Agency Guide to the Public Interest Disclosure Act 2013* issued by the Office of the Commonwealth Ombudsman, a 'discloser should not investigate a matter themselves before making a disclosure as this may hinder a future investigation'[510]. Accordingly, I did not investigate the matter myself. I left it to the PID investigator, Ms McMullan, to investigate the allegations set out in the internal disclosure report. Ms McMullan's idea of investigating appears to have been to call on Ms Lagos, the Chief Executive Officer and Principal Registrar of the Federal Court of Australia, to deliver up materials that Ms Lagos felt answered Ms McMullan's queries for evidence. That is where the 'investigation' ended for Ms McMullan. It was, as I will contend, a fatal error.

1243 As I have noted, Ms McMullan made a factual finding, on the balance of probabilities, that 'no "veto power" was exercised or purported to be exercised by the Australian Public Service Commissioner's representative on the selection panel'. How interesting. Ms McMullan did not gather evidence from Ms Vine-Camp. Ms McMullan did not gather evidence from Mr Soden. Ms McMullan did not gather evidence from the APSC. Ms McMullan did not gather evidence from Justice Greenwood. Ms McMullan did not gather evidence from Mr Belcher. Ms McMullan did not gather evidence from Ms Lagos, Mr Pringle or Ms Jarratt, the members of the selection committee. The only items of 'evidence' that Ms McMullan gathered and referred to were materials sent to Ms McMullan on behalf of the Chief Executive Officer and Principal Registrar of the Federal Court of Australia, Ms Lagos, a person against whom accusations of wrongdoing were made, and emails and materials prepared by the discloser.

1244 How is it that Ms McMullan made a factual finding, on the balance of probabilities, that 'no "veto power" was exercised or purported to be exercised by the Australian Public Service Commissioner's representative on the selection panel'?

1245 Ms McMullan made the finding thus:

[509] PID Act, s 47(1).
[510] *Agency Guide to the Public Interest Disclosure Act 2013*, Version 2 (issued in April 2016), p 26.

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(1) the discloser has not provided any evidence that Ms Vine-Camp *actually* exercised a veto power, or *actually* purported to exercise a veto power (in discussions with Mr Soden or with members of the selection panel);

(2) the Chief Executive Officer and Principal Registrar of the Federal Court of Australia, Ms Lagos, or people acting on her behalf, have not provided any evidence that Ms Vine-Camp *actually* exercised a veto power, or *actually* purported to exercise a veto power (in discussions with Mr Soden or with members of the selection panel);

(3) despite being tasked by the Parliament with the duty to investigate, I, as investigator, choose not to conduct interviews with the people who would be in a position to provide me with evidence of whether the Australian Public Service Commissioner's representative *actually* exercised a veto power, or *actually* purported to exercise a veto power (e.g. Ms Kerryn Vine-Camp, Mr Soden, Ms Lagos, Mr Pringle, Ms Jarratt) even though the concept of investigation under the PID Act naturally extends to the investigator investigating reasonable lines of inquiry;

(4) therefore, the evidence suggests, on the balance of probabilities, that:

a) 'no "veto power" was exercised' by Ms Vine-Camp; and

b) 'no "veto power" was 'purported to be exercised by' Ms Vine-Camp.

1246 Can you spot the error? It does not follow that because Ms McMullan failed to make a reasonable inquiry for evidence as part of an investigation under the PID Act that the allegation that Ms Vine-Camp *actually* exercised a veto power, or *actually* purported to exercise a veto power (in discussions with Mr Soden or with members of the selection panel) is, on the balance of probabilities, not the case. Ms McMullan's 'finding' is mindboggling. It is illogical. Were it not so frustrating, it would risible. It is certainly embarrassing. It also demonstrates why Ms McMullan's investigations was inadequate, and why my belief that Ms McMullan's investigation was inadequate is eminently reasonable.

8.5.2.3 'On the balance of probabilities ... Mr Belcher was appointed to a[n] Executive Level 2 position on the basis of a role review undertaken across the [REDACTED] rather than because of any actions or recommendations of the Australian Public Service Commissioner's representative on the selection panel'

1247 Ms McMullan found, as a matter of fact, that '[o]n the balance of probabilities ... Mr Belcher was appointed to a[n] Executive Level 2 position on the basis of a role review undertaken across the [REDACTED] rather than because of any actions or recommendations of the Australian Public Service Commissioner's representative on the selection panel'.

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1248 There are two broad elements to Ms McMullan's finding of fact.

1249 First, Ms McMullan found, as a matter of fact, that Mr Belcher was not 'appointed to a[n] Executive Level 2 position ... because of any actions or recommendations of the Australian Public Service Commissioner's representative on the selection panel'.

1250 As I have already explained, a failure to make reasonable inquiries as part of the duty to investigate a public interest disclosure under the PID Act cannot form the basis of a finding of fact, on the balance of probabilities, that there is no evidence that an act occurred or did not occur. But this is exactly what Ms McMullan has done.

1251 Ms McMullan has failed to make reasonable enquiries of those persons who would be in a position to provide probative evidence about the claim that Ms Vine-Camp took actions to have Mr Belcher 'appointed' to an Executive Level 2 position, or made recommendations in relation to Mr Belcher's 'appointment' to an Executive Level 2 position (e.g. Ms Vine-Camp, Mr Soden, Ms Lagos, Mr Pringle, Ms Jarratt) and has, on the basis of that failure to investigate the relevant matter under the PID Act, concluded that, at best impliedly, there is no evidence that Ms Vine-Camp took actions to have Mr Belcher 'appointed' to an Executive Level 2 position, or made recommendations in relation to Mr Belcher's 'appointment' to an Executive Level 2 position, and that, therefore, on the balance of probabilities, the allegation that Ms Vine-Camp took actions or made recommendations to that effect is unsubstantiated.

1252 This finding of fact is not so much a finding of fact as it is an act of 'see no evil, hear no evil' and, therefore, 'no evidence exists'. It is nothing short of an abdication of the duties Parliament has placed on principal officers, and their delegates, to conduct lawful investigations under the PID Act.

1253 Second, Ms McMullan found, as a matter of fact, that '[o]n the balance of probabilities ... Mr Belcher was appointed to a[n] Executive Level 2 position on the basis of a role review'.

1254 The only evidence Ms McMullan had of a 'role review' was the set of Mr Soden's capricious scribblings on the report of 'Judicial Registrar Recruitment', set out in Annexure EDR – 93. A few scribbles on a document do not constitute a 'role review'.

1255 According to the *Australian Public Service Classification Guide*, a document prepared by the Australian Public Service Commission, a role evaluation involves, first, gathering evidence to

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understand the role (job analysis), and, second, the assessment of the role against the work level standards set by the Australian Public Service Commission.[511]

1256 The aim of job analysis is to obtain sufficient factual information to allow an informed assessment of the essential nature of the work and its relative value. Job analysis is an integral part of any job evaluation process.[512]

1257 The assessment of a role integrates the information obtained from a job analysis activity and uses it to inform decisions about the role. The primary purpose is to allocate a classification level to a job, however this step may also be used to design or re-design job responsibilities.[513] To classify a job, the information obtained about the role and responsibilities is compared with the relevant work level standards.[514]

1258 Importantly, at pages 27 and 28 of the *Australian Public Service Classification Guide*, the following is noted:

> Thorough information and documentation procedures relating to classification decisions are necessary elements in safeguarding the integrity of the process. A decision to allocate a new or revised classification level to a job is made under delegated authority under the Public Service Act 1999 and the Public Service Classification Rules 2000. This means a record of the decision must be made, including the reasons for the decision.
>
> Adequate documentation in support of classification decisions can also provide valuable information to assist any subsequent review of a job where, for example, further work value changes may need to be assessed.
>
> Appropriate documentation includes, but is not limited to, job descriptions, completed questionnaires and interviews. Other supporting documentation may include:
>
> - background information (who initiated the action and why)
> - in the case of a new role - some evidence that the need for the new role had been established
> - an assessment of the resource impact of the creation or reclassification

[511] *Australian Public Service Classification Guide*, p 22.
[512] Ibid, p 23.
[513] Ibid, p 26
[514] Ibid.

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- an analysis leading to task and job design
- supporting reasons for the classification decision, including reference to the comparisons made with formal standards
- in the case of a reclassification - a summary and assessment of work value change, including reference to the authority for the change.

Maintaining such records is important to an agency's ability to manage its classification arrangements effectively. The extent of detail and the type of information provided in support of the decision made also depends upon the nature and complexity of the role.

1259 According to the *Public Service Classifications Rules 2000*, an agency head must allocate an approved classification to each group of duties to be performed in the Agency.[515] The allocation of an approved classification to a group of duties must be based on the work value of the group of duties.[516] The allocation of an APS Level classification, Executive Level classification or SES classification to a group of duties must be based on the work value of the group of duties described in the work level standards for that classification issued, in writing, by the Commissioner (as those standards exist on 1 December 2014).[517]

1260 Section 15AA of the AI Act provides:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

1261 Subsection 15AB(1) of the AI Act provides:

> Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
>
> (e) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or

[515] *Public Service Classification Rules 2000*, s 9(1).
[516] Ibid, s 9(2).
[517] Ibid, s 9(2A).

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(f) to determine the meaning of the provision when:

(v) the provision is ambiguous or obscure; or

(vi) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

1262 Paragraph 15AB(2)(e) of the AI Act provides:

> Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted.

1263 By section 13 of the *Legislation Act 2003*, the AI Act applies to legislative instruments, such as the *Public Service Classification Rules 2000* and the *Australian Public Service Commissioner's Direction 2016*, as if those instruments were an Act of the Commonwealth Parliament, and as if each provision of those instruments were a section of an Act of the Commonwealth Parliament.

1264 Thus, by section 15AA of the AI Act, in interpreting section 9 of the *Public Service Classification Rules 2000*, Mr Soden should have given effect to the interpretation that would best achieve the purpose or object of the *Public Service Classification Rules 2000* (whether or not that purpose or object is expressly stated in those Rules).

1265 By subsection 9(2A) of the *Public Service Classification Rules 2000*, Mr Soden was obligated to allocate an APS Level classification, Executive Level classification or SES classification to a group of duties based on the work value of the group of duties described in the work level standards for that classification issued, in writing, by the Commissioner (as those standards exist on 1 December 2014). That rule is as plain as day. The work level standards are well known standards and their existence is better known. Nonetheless, by virtue of paragraph 15AB(1)(a) and subsection 15AB(2) of the AI Act, it was open to Mr Soden to consider extrinsic materials to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision, taking into account its context in the Act and the purpose or object underlying the Act.

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1266 The background to the explanatory statement supporting the enactment or amendments, as the case may be, of each of subsections 9(2), 9(2A), 9(3) and 9(4) of the *Public Service Classification Rules 2000* reads as follows:

> The PS Act provides for the establishment and management of the APS. The Public Service Classification Rules 2000 (the Classification Rules) made under subsection 23(1) of the PS Act provide a systematic, APS-wide approach to the classification of duties (or jobs) in the APS with work value as the underlying basis. The Classification Rules are integral to the structure of the APS workforce and facilitate mobility in the APS.
>
> The Classification Rules require an Agency Head to allocate an approved classification to each group of duties to be performed in the Agency and to allocate an approved classification to each APS employee based on the group of duties to be performed by the employee. Allocation of a classification to a group of duties is based on the work value of the duties. Work value is assessed by reference to work level standards.
>
> The Classification Rules are being amended to strengthen the integrity of the classification system and achieve greater consistency in classification across the APS. This Amendment requires Agency Heads use work level standards issued by the Commissioner when allocating APS Level and Executive Level classifications (APS work level standards).
>
> In 2013, the Australian Public Service Commission published the APS work level standards and agencies were encouraged to adopt them. In March 2014, it was indicated in the Australian Government Public Sector Workplace Bargaining Policy that the Commissioner intended to mandate the APS work level standards through changes to the Classification Rules.
>
> Requiring that Agency Heads use the APS work level standards issued by the Commissioner for allocating classifications to APS Level and Executive Level jobs— rather than agency specific work level standards—is consistent with the approach for Senior Executive Service (SES) work level standards issued by the Commissioner and mandated through changes to the Classification Rules on 5 December 2012.
>
> Under this Amendment, agencies are not required to evaluate existing jobs against work level standards issued by the Commissioner for APS Level and Executive Level classifications.
>
> Agency Heads are required, however, to use the work level standards issued by the Commissioner whenever assessing work value and allocating an approved classification for an APS Level or Executive Level job, from 1 December 2014.

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1267 The purpose of the explanatory statement supporting the enactment or amendment, as the case may be, of each of subsections 9(2), 9(2A), 9(3) and 9(4) of the *Public Service Classification Rules 2000* provides that:

> The main purpose of the Public Service Classification Amendment (Work Level Standards and Other Measures) Rule 2014 is to amend the Classification Rules to require that, from 1 December 2014, whenever an Agency Head allocates an APS Level, Executive Level or SES classification to a group of duties, it must be in accordance with work level standards issued in writing by the Commissioner as those standards exist on 1 December 2014.
>
> - These work level standards are published in documents titled Australian Public Service Work level standards APS Level and Executive Level classifications (APS Work level standards) and APS Senior Executive Service Work Level Standards (SES Work level standards).
> - Links to the APS Work level standards as at 1 December 2014, can be found at http://www.apsc.gov.au/publications-and-media/current-publications/worklevel-standards.
> - Links to the SES Work level standards as at 1 December 2014 can be found at http://www.apsc.gov.au/aps-employment-policy-and-advice/ses/ses-classifications.

1268 The law requires an agency head to allocate an APS Level classification, Executive Level classification or SES classification to a group of duties based on the work value of the group of duties described in the work level standards for that classification issued, in writing, by the Commissioner. An agency head contravenes the law if he or she allocates an APS Level classification, Executive Level classification or SES classification to a group of duties other than by reference to the work value of the group of duties described in the work level standards for that classification issued, in writing, by the Commissioner.

1269 One reason an agency head is required by law to allocate classifications based on the work value of the group of duties described in the work level standards for that classification issued, in writing, by the Commissioner to strengthen the *integrity of the classification system* across the APS.

1270 As already noted, the APSC's policies provide that:

> Thorough information and documentation procedures relating to classification decisions are necessary elements in safeguarding the integrity of the process. A decision to allocate a new or revised classification level to a job is made under delegated authority under the Public Service

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Act 1999 and the Public Service Classification Rules 2000. This means a record of the decision must be made, including the reasons for the decision.[518]

1271 Despite making requests, in broad and general terms, for relevant items of evidence, including materials demonstrating the lawful reclassification of the National Judicial Registrar & District Registrar roles in the Queensland and Western Australia District Registries from SES Band 1 to Executive Level 2, no such documents were provided to Ms McMullan.

1272 There was no evidence before Ms McMullan that Mr Soden, or anybody else constituting the Federal Court of Australia Statutory Agency, allocated a revised classification, from SES Band 1 to Executive Level 2, to the groups of duties that constituted the National Judicial Registrar & District Registrar roles in the Queensland District Registry or the Western Australia District Registry based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification.

1273 There was no evidence to suggest that any records other than Mr Soden's capricious scribblings, set out in Annexure EDR – 93, exist to support Ms McMullan's statement that 'role review' was conducted. Those scribblings and scrawlings do not constitute evidence of a lawful 'role review' in so far as they are relied on by Ms McMullan to claim that Mr Soden, or somebody else constituting part of the Federal Court of Australia Statutory Agency, conducted a lawful review of the classification allocated to the group of duties that constituted the National Judicial Registrar role based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification.

1274 Ms McMullan's claim that the National Judicial Registrar & District Registrar vacancy in the Queensland District Registry was the subject of a 'role review' cannot be accepted. There was no evidence available to Ms McMullan to conclude that a lawful 'role review' had taken place, because there was no evidence that anybody constituting the Federal Court of Australia Statutory Agency, including the agency head, had allocated a revised classification, from SES Band 1 to Executive Level 2, to the group of duties that constituted the National Judicial Registrar role based on the work value of the group of duties described in the work level standards for the Executive Level 2 classification.

[518] *Australian Public Service Classification Guide*, pp 27-28.

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1275 Thus, the first element identified demonstrates that Ms McMullan's finding of fact is not a finding of fact. Rather it is the outcome of, firstly, a misapprehension of her duties as the delegate of the principal officer of the APSC to investigate the disclosure allocated to the APSC under Division 1 of Part 3 of the PID Act and, secondly, some very dubious reasoning. The second element identified demonstrates that Ms McMullan's finding of fact (i.e. that'[o]n the balance of probabilities … Mr Belcher was appointed to a[n] Executive Level 2 position on the basis of a role review') is patently false.

1276 Ms McMullan's misapprehension of her duties under the PID Act, her dubious reasoning and her findings about 'role reviews' that are affected by her misapprehension of the law of classifying duties under the *Public Service Classification Rules 2000* demonstrate why Ms McMullan's investigation was inadequate.

8.5.2.4 '[I]t is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner's representative on the selection panel had exercised a "veto power"', but that 'in absence of a "veto power" being exercised or being purported to be exercised, any incorrect statement by Mr Soden … about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct'

1277 Ms McMullan made the following 'findings' of fact:

> [I]t is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner's representative on the selection panel had exercised a "veto power"', but that 'in absence of a "veto power" being exercised or being purported to be exercised, any incorrect statement by Mr Soden … about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', and that, accordingly, Ms McMullan would refuse to make 'further findings about any such comments that may have been made'.

1278 Let us unpack these 'findings' of fact.

1279 First, Ms McMullan found that 'it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner's representative on the selection panel had exercised a "veto power"'. I can explain why 'it is not clear whether or for what purpose Mr Soden may have made representations that the Australian Public Service Commissioner's representative on the selection panel had exercised a "veto power"'. Ms McMullan failed to make relevant enquiries as part of her duty to investigate the disclosure allocated to the APSC under Division 1 of Part 3 of the PID Act. Ms McMullan failed to seek

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probative evidence from Mr Soden. Ms McMullan failed to seek probative evidence from Ms Vine-Camp. Ms McMullan failed to do what Parliament has charged the principal officer of an agency, and by extension, a principal officer's delegate, to do under the PID Act. That is as plain as day.

1280 Second, Ms McMullan makes a conclusory statement of fact when she states that there is an 'absence of a "veto power" being exercised or being purported to be exercised'. As has been demonstrated in part 8.5.2.2, Ms McMullan did not arrive at that 'finding of fact' (i.e. a 'veto power' was not, in fact, exercised by Ms Vine-Camp and Ms Vine-Camp did not purport to, in fact, exercise a 'veto power') in a manner dictated by logic, reason or the law. Ms McMullan came to that finding of fact because she, in effect, refused to consider reasonable lines of inquiry as part of her duties to investigate the disclosure allocated to the APSC under Division 1 of Part 3 of the PID Act and, 'thus' concluded that, on the balance of probabilities, the evidence did not support the conclusion that a) a '"veto power" was exercised' by Ms Vine-Camp and b) a "veto power" was 'purported to be exercised by' Ms Vine-Camp (don't bother trying to make sense of it – it's hurts the brain). Findings of fact are made, and based, on evidence, and not some fiat supported by nonsense.

1281 Third, on the basis of the (supremely dubious) finding that a 'veto power' was not 'exercised or being purported to be exercised', Ms McMullan made the finding that 'any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', which, in turn, permitted Ms McMullan to refuse to make 'further findings about any such comments that may have been made'.

1282 This line of reasoning is extraordinarily bewildering, even by standards of Ms McMullan's PID report.

1283 It is not at all clear to me what Ms McMullan is trying to communicate by stating that 'any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct'.

1284 The allegation that Mr Soden misled Justice Greenwood about the exercise of a 'veto power' by the Australian Public Service Commissioner's was not made 'in and of itself'. The allegation that Mr Soden misled Justice Greenwood about the exercise of a 'veto power' by the Australian

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Public Service Commissioner's representative was made in the context of complaints about contraventions of the Code of Conduct in the PS Act, and contraventions of the *Public Service Classification Rules 2000* and the *Australian Public Service Commissioner's Directions 2016* by public servants who constitute the Federal Court of Australia Statutory Agency. The bewildering nature of Ms McMullan's statement 'any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct' is best articulated by way of an analogous example.

1285 Suppose that on a dark night, Z overhears a ruckus and catches a glimpse of A assaulting B. A disappears into the night. Z approaches B to find B bludgeoned, especially about his head. Z contacts crime-stoppers or the police to disclose what he has seen. The police arrive and do what they do. The weapon used to bludgeon B is not found when the police arrive. Somewhat troubled by the experience, Z decides to go for a walk. Some 800 metres from the location of the bludgeoning, Z stumbles upon a rock that is covered in still not entirely dried blood. Z notices hair fibres on the rock. Z contacts crime-stoppers to report his find. A police investigator, McMullan, shows up to investigate. McMullan's attention is drawn to the blood stained rock. McMullan states that 'a blood stained rock with hair fibres does not *in and of itself* constitute a disclosable matter' and, on that basis, dictates that 'further findings about this thing, which does not, in and of itself, constitute a disclosable matter, shall not be made'.

1286 Z, bewildered by the response, notifies McMullan's superiors, who berate McMullan for decontextualizing information about what may well be the weapon used by the assailant A.

1287 The contrivance Ms McMullan would have the discloser accept would make Zeno of Elea blush.

1288 But more than that, Ms McMullan makes a fatal error of legal reasoning in her 'finding' that 'any incorrect statement by Mr Soden ... about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', which, in turn, permits Ms McMullan to refuse to make 'further findings about any such comments that may have been made'.

1289 The PID Act sets out how disclosures are to be handled. I think it cannot be disputed that I made an internal disclosure to an authorised internal recipient in the Office of the Commonwealth Ombudsman on 23 March 2020. On 11 May 2020, an authorised officer of the

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Office of the Commonwealth Ombudsman allocated the handling of the internal disclosure to the Australian Public Service Commission under Part 3, Division 1 of the PID Act. Having been so allocated, either the principal officer of the APSC, being the Australian Public Service Commissioner, or his delegate, was required to investigate the internal disclosure.[519] Under subsection 50(1) of the PID Act, the principal officer (or his delegate) must, as soon as reasonably practicable, inform the discloser that either a) the principal officer (or his delegate) is required to investigate the disclosure or b) the principal officer (or his delegate) has decided under section 48 or 49 not to investigate the disclosure under this Division, or not to investigate the disclosure further.

1290 No decisions were made under either sections 48 or 49 of the PID Act to not investigate the internal disclosure I made.

1291 On Wednesday, 29 July 2020, Ms McMullan wrote to me by email and noted:[520]

> As a delegate of the principal officer of the Australian Public Service Commissioner, I am writing to notify you under section 50 of the Public Interest Disclosure Act 2013 that I am investigating your disclosure, following allocation by the Commonwealth Ombudsman on 11 May 2020.

1292 Ms McMullan plainly accepted the entirety of the internal disclosure as that; an internal disclosure. She did not (correctly) draw distinctions between an internal disclosure relating to the recruitment of National Judicial Registrars, an internal disclosure relating to the recruitment of people in the positions of National Judicial Registrar & District Registrar, an internal disclosure relating to the recruitment of National Registrars or an internal disclosure relating to misleading statements made by the agency head of the Federal Court of Australia Statutory Agency to a Federal Court judge. Thus, Ms McMullan was required, under the PID Act, to investigate the internal disclosure.

1293 Whatever else might be said about the allegations that Mr Soden (and others) misled Justice Greenwood, or knowingly allowed Justice Greenwood to be misled by Mr Soden, it cannot be said that the allegations were not a cardinal feature of the internal disclosure. Those allegations

[519] PID Act, s 47.
[520] Email of 29 July 2020 from KMc to discloser

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were essential to the internal disclosure. Those allegations were the lynchpin of part 5 of the internal disclosure report.

1294 Ms McMullan plainly accepted that she was 'required to investigate the disclosure' pursuant to the PID Act. She notified me accordingly. Under the PID Act, Ms McMullan was not at liberty to 'make the finding' that 'any incorrect statement by Mr Soden … about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', which would, in turn, permit Ms McMullan to refuse to make 'further findings about any such comments that may have been made'. Ms McMullan was duty bound to investigate the conduct. She may have found that Justice Greenwood was not misled or, even if he was, responsibility would not be ascribed to Mr Soden. But in refusing to make 'further findings about any such comments that may have been made' on the misconceived basis that 'any incorrect statement by Mr Soden … about action taken by the Australian Public Service Commissioner's representative on the selection panel would not in and of itself constitute disclosable conduct', it is my view that Ms McMullan derogated from her duty to investigate the internal disclosure and lapsed into an error of law (i.e. she misapprehended her duties under the PID Act).

1295 For the reasons set out, I am convinced Ms McMullan's investigation of the internal disclosure was inadequate.

9. CONCLUDING NOTES

9.1 Non-compliant PID report

1296 On Wednesday, 23 December 2020, Ms McMullan provided me with a redacted copy of her investigation report. A copy of that report is set out in Annexure EDR – 11.

1297 Section 51 of the PID Act sets out, among other things, duties and obligations associate with the preparation of a PID report.

1298 Subsection 51(3) of the PID Act provides that '[i]n preparing the report [of the investigation], the principal officer must comply with any standards in force under section 74'. The reference to principal officer extends to the principal officer's delegate.

1299 The standards in force under section 74 of the PID Act are the *Public Interest Disclosure Standards 2013*. Section 13 of those standards provides:

> A report under section 51 of the Act must, where relevant: